

**FEDERAL TRADE COMMISSION  
OFFICE OF THE SECRETARY  
ROOM 159-H  
600 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON DC, 20580**

**FACTA IDENTITY THEFT RULE  
MATTER No. R411011**

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**COMMENTS OF ACA INTERNATIONAL IN RESPONSE  
TO THE FEDERAL TRADE COMMISSION'S REQUEST  
FOR COMMENT ON THE FACTA IDENTITY THEFT RULE**

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**INTRODUCTION**

The following comments are submitted on behalf of ACA International (“ACA”) in response to the request by the Federal Trade Commission (“FTC” or “Commission”) for comments on the notice of proposed rulemaking to issue regulations implementing the identity theft prevention provisions set forth in sections 111-112 of the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”). *See* 69 Fed. Reg. 23370 (April 28, 2004) (“NPRM”). Pursuant to the proposed rulemaking, the Commission seeks to adopt rules to establish (1) definitions for the terms “identity theft” and “identity theft report;” (2) the duration of an “active duty alert;” and (3) the appropriate proof of identity for placing fraud alerts and active duty alerts.

**I. Statement on ACA**

ACA International is an association of credit and collection professionals who provide a wide variety of accounts receivable management services. Founded in 1939 and headquartered in Minneapolis, ACA represents approximately 5,300 third party collection agencies, attorneys, credit grantors, and vendor affiliates. ACA members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. ACA’s mission is to help its members serve their communities and meet the challenges created by changing markets through leadership, education, and service. ACA members comply with all applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established

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by ACA. ACA members are regulated by the Commission under the Fair Debt Collection Practices Act (“FDCPA”), the Fair Credit Reporting Act (“FCRA”), the Gramm-Leach-Bliley Act (“GLBA”), and other federal and state laws.

ACA members generally are “furnishers” of consumer information under the FCRA, as amended by the FACTA. As accounts receivable management businesses, ACA members use and furnish consumer report information and records. This information generally is provided to ACA members in the first instance by creditors, for example, credit grantors, healthcare organizations, and various retail merchants. The information is used to attempt the collection of past due accounts receivable on behalf of the underlying creditor. In some instances, ACA members also are “users” of consumer reports where permissible under the FCRA to effectuate collection.

**II. Summary of New FACTA Requirements**

Before commenting on the proposed rule, ACA believes it necessary to briefly identify the specific provisions of the FACTA that impact data furnishers. The FACTA amended the FCRA to add various new provisions, including subsection 605B which requires nationwide consumer reporting agencies and information furnishers to block information appearing on a consumer’s credit file when the consumer indicates that the information resulted from identity theft. The FACTA defines “identity theft” as a fraud committed using another person’s identifying information subject to further refinements by the Commission. FACTA, § 111. Those refinements, as proposed in the NPRM, include (1) making the term “identifying

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information” synonymous with the United State’s Criminal Code’s definition of “means of identification” set forth in 18 U.S.C. § 1028(d)(3); (2) including “attempted” fraud within the meaning of “identity theft,” and (3) requiring that the identifying information be used without lawful authority. Proposed § 603.2. ACA notes that the NPRM appears to contain an incorrect statutory citation to 18 U.S.C. § 1028(d)(7) for the term “means of identification” which, in fact, is the citation for the definition of “transfer.” The criminal code defines “means of identification” at 18 U.S.C. § 1028(d)(3) in a manner consistent with that proposed in 16 C.F.R. § 603.2 (definition of “identity theft”).

The FACTA permits a consumer to contact a nationwide consumer reporting agency to request a block on the identity theft information pursuant to subsection 605B. Before the block can be implemented, however, the consumer must provide detailed information to the agency including (1) proof of identity, (2) a copy of an “identity theft report,” (3) the identification of the information in his or her credit file that is the result of identity theft, and (4) a statement that the information is unrelated to a transaction by the consumer. FACTA, § 152(a).

The FACTA provides minimum standards for the content of an “identity theft report.” At a minimum, the report must allege that an identity theft occurred; provide a valid copy of a report filed with an appropriate Federal, State, or local law enforcement agency; and subject the consumer to criminal prosecution for filing false information. FACTA, § 111. To protect against abuse, the proposed rule adds a requirement that the consumer provide as much

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specificity as possible in the report, and allows information furnishers the right to request additional information or documentation to help determine the validity of the alleged identity theft. 69 Fed. Reg. at 23372 cols. 2-3.

Upon receipt of an identity theft report and request for a block, a nationwide consumer reporting agency must notify the information furnisher that (1) the information furnisher's data may be the result of identity theft; (2) the consumer has filed an identity theft report; (3) the consumer has requested a block of the information; and (4) the effective dates of the block. FACTA, § 152(a). A furnisher must have reasonable procedures in place to respond to such notice from the nationwide consumer reporting agency and prevent refurnishing the information. FCRA, § 623(a)(6)(A).

The FACTA also permits consumers to send an identity theft report directly to information furnishers. Pursuant to subsection 623(a)(6)(B), the consumer must send the report to the address specified by the information furnisher, and the report must state that the information maintained by the information furnisher results from identity theft. FCRA, § 623(a)(6)(B). Thereafter the information furnisher is prohibited from providing the information to a nationwide consumer reporting agency unless it knows or is informed by the consumer that the information is correct. *Id.*

**III. Comments on the Identity Theft Rule**

**A. ACA Supports the Objectives of the Identity Theft Rule**

As a general comment, ACA supports the Commission's effort to curb the rising tide

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of identity theft. ACA encourages the Commission to make sure that the final provisions promulgated by the government also contain provisions against the potential for abuse of the new protections afforded consumers.

As the Commission's 2003 Consumer Fraud and Identity Theft Report determined, fully 200,000 of the total 500,000 consumer complaints received by the Commission in 2003 related to identity theft. More than 70 percent of the identity theft complaints traced to fraudulent conduct in the areas of credit cards, telephones, utilities or banks. The companies in these industries rely on debt collectors to assist them in the collection of their receivables. As such, the debt collection industry is well versed in the negative implications of identity theft.

ACA members witness first hand the effects of identity theft. In many instances, the theft is unknown to a consumer until a delinquency prompts a creditor to assign the account to an accounts receivable management firm for collection. It is during the attempt to collect the account that an ACA member brings the theft to the attention of the consumer and, to the extent possible, helps them begin the process of addressing and rectifying the problem. In this regard, ACA members have been instrumental in providing victims with an identity theft affidavit and other resources and information to help them clear up the theft.

Identity theft has many victims, however. In addition to the consumers whose identity is stolen, identity theft harms businesses in the United States. Consumers typically do not have to pay for the fraudulent charges of identity thieves. Under many state and federal laws,

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as well as the policies of individual companies, it is the business from which the goods or services were obtained fraudulently or the financial institutions that extended the credit that pays. These financial losses are staggering. The Treasury Department estimated that total credit card fraud losses in 2000 resulting from identity theft ranged between \$2-\$3 billion. These losses are absorbed not only by business, but also by consumers through higher prices and increases in the costs of credit, as well as the accounts receivable management industry that invests time and labor in attempting collection of accounts that ultimately are uncollectible by reason of identity theft.

**B. The Definition of “Identity Theft Report” Should Contain Additional Procedural Protections to Prevent the Abuse of the Block Provisions as a Means to Avoid Bona Fide Debts**

ACA agrees with the Commission’s concern that the powerful new tools Congress enacted to help the victims of identity theft also offer the opportunity to subvert the collection of legitimate debts. As the NPRM correctly notes, if an information furnisher receives a copy of an identity theft report “by means of an automated system with little detail about the identity theft, it may be difficult for it to determine whether the consumer presenting the identity theft report is a bona fide victim or an individual with delinquent debts seeking to clear his or her record.” 69 Fed. Reg. at 23372 col. 2.

The Commission is correct in observing that the “potential for abuse of the credit reporting system is significant.” *Id.* The abuse, however, is not limited to the credit report system, but includes the collection of debts. An important component of the credit and

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collections industry is that furnishers of consumer information report accurate information concerning delinquent debts. This reporting function provides an accurate barometer for future potential creditors to assess the credit risk presented by a consumer's prior reporting history based on negative tradeline entries (as well as neutral or positive entries). It similarly provides an incentive for a consumer to pay their debts in order to maintain the best possible credit history by removing derogatory references from his or her consumer report. The FACTA identity theft provisions undermine this incentive by permitting a consumer to block negative tradeline information in a manner markedly easier than in the past, and for this reason, an unscrupulous consumer might seek an advantage much the same as identity thieves have taken advantage of weaknesses in the credit reporting system heretofore.

To deter the potential for abuse, the Commission proposes two procedural safeguards contained in the definition of "identity theft report": (1) requiring consumers to allege the identity theft in the report with as much specificity as possible; and (2) permitting information furnishers to make reasonable requests for additional information from the consumer if made within 5 business days after the receipt of a law enforcement report or the request by the consumer for the particular service. FCRA, § 603.3(a). Subsection 603.3(b) provides examples of the specificity consumers should provide if possible.

As presently drafted, these safeguards are insufficient to deter the potential abuse to the credit and collections industry noted by the Commission. ACA offers three comments in this regard. First, the examples of the specificity that a consumer must provide in filing an

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identity theft report are too narrow. The Commission offers, for illustrative purposes only, several examples of the type of specificity that consumers should include in the report: (1) specific dates relating to the identity theft such as when the loss or theft of personal information occurred or when the fraud(s) using the personal information occurred, and how the consumer discovered or otherwise learned of the theft; (2) identification information or any other information about the perpetrator, if known; (3) name(s) of information furnisher(s), account numbers, or other relevant account information related to the identity theft; and (4) any other information known to the consumer about the identity theft. FCRA, § 603.3(b).

ACA believes that the Commission's specificity examples should clearly delineate the information the consumer must provide, if available, to an information furnisher. Based on the experience of ACA members, the data consumers should provide include: (1) full legal name, (2) date of theft, (3) date of birth, (4) social security number, (5) proof of residency, including address when theft occurred, if different, (6) telephone number(s), (7) a copy of a government issued identification card, such as a driver's license, (8) name and address of creditor, (9) account number, and (10) amount of the theft. This information is in addition to, not in lieu of, the items already listed by the Commission in subsection 603.3(b).

Modifying the specificity examples in subsection 603.3(b) ultimately would help consumers and the credit and collection industry. Consumers will have a better understanding of the type of information they should record and be prepared to provide to an information furnisher. The furnisher requires this information to evaluate the report and act upon the

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consumer's request for a block. By providing the data to the furnisher upfront, consumers are benefited by reducing the possibility that an information furnisher will need to request more data from the consumer, thereby maximizing the speed and efficiency of processing the consumer's request.

Second, the Commission proposes an unreasonable 5 business day deadline during which the information furnisher can make reasonable requests for additional information under subsection 603.3(a)(3). The 5-day deadline does not account for the myriad of transactions that need to occur in order to evaluate the validity of identity theft report and, if necessary, request more information from the consumer. ACA envisions that consumers commonly will forward reports to debt collectors. Collectors frequently have direct oral and written contact with consumers on behalf of creditors. Collectors also report delinquent accounts to nationwide consumer reporting agencies on behalf of creditors. Upon receipt of identity theft report as contemplated by subsection 623(a)(6)(B), the debt collector must evaluate the report, communicate with the underlying creditor, and receive confirmation from the creditor based on its own internal investigatory process whether the report contains sufficient information to establish its validity or, alternatively, whether additional information is required (and, if so, the specific information that is required).

Five business days is not enough time for these various transactions to be completed thoroughly and accurately in light of the thousands of transactions that will be processed. Without a more reasonable period of time, the Commission's proposed 5-day deadline likely

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will result in many information furnishers mailing of standard form letters seeking additional information from the consumer immediately after the receipt of the report simply as a means to avoid a violation of the rule (provided that the request is reasonable). To avoid this result and to encourage maximum accuracy in evaluating the reports, ACA believes the deadline should be 30 days. Such a deadline is consistent with the other FCRA regulations requiring information furnishers to conduct an investigation of a consumer dispute to determine its accuracy and report the results of the investigation to a nationwide consumer reporting agency within 30 days after the dispute is filed with the agency by the consumer. FCRA, § 623(b).

Third, the Commission's final rule should clarify that a consumer's filing of an identity theft report with an information furnisher, and the furnisher's subsequent request for additional information, cannot form the basis of an alleged violation of section 809 of the FDCPA. ACA is concerned that the 5 day deadline for requesting information from consumers proposed by the Commission in the instant rulemaking will place some debt collectors in violation of the FDCPA's prohibition on the continued collection of debts after a consumer notifies a debt collector in writing that a debt is disputed. Section 809(b) of the FDCPA states:

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt . . . is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is

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mailed to the consumer by the debt collector.

15 U.S.C. § 1692g. Although it is first impression, it may be argued that a written communication from a debt collector/information furnisher seeking more data from a consumer during this period is a form of “collection of the debt,” particularly if the collector determines that the debt is valid and the alleged identity theft inaccurate. Indeed, although ACA disagrees, some courts have concluded that the 30-day validation period is a “grace” period from collections subjecting collectors to statutory violations for communications occurring during this period. *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2<sup>nd</sup> Cir. 1996) (holding that additional language overshadowed the validation notice due to language that “to take any course of action other than payment . . . within ten days, . . . would permanently affect [the debtor's] credit record”); *Gordon v. Fink*, 1995 WL 55242 (N.D. Ill. 1995). *Cf. Savino v. Computer Credit, Inc.*, 164 F.3d 81, 85-86 (2<sup>nd</sup> Cir. 1998). To resolve this conflict between the FACTA and the FDPCA, ACA requests that the final rule promulgated by the Commission expressly state that an information furnisher/debt collector which communicates with a consumer in a manner consistent with the Identity Theft Rule provisions by seeking additional information to confirm the validity of an alleged theft does not violate the restrictions of section 809 of the FDCPA.

**CONCLUSION**

ACA appreciates the opportunity to comment on the Commission’s proposed Identity Theft Rule. If you any questions, please contact Rozanne Andersen, ACA International

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